Supreme Court, U.S.
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No. 10-918

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN HENDERSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a prior Missouri disposition resulting in a one year suspended imposition of sentence, which is not an appealable disposition or considered a "conviction" under Missouri law, ought to be considered a "prior conviction" that has "become final" for purposes of the penalty enhancement provision of 21 U.S.C. §851, which increases the mandatory minimum sentence from ten or twenty years to one of life imprisonment without the possibility of parole.

2. Whether the due process clause of the United States Constitution requires the court to apply the rule of lenity in choosing between conflicting precedents of the court with regard to the interpretation of a sentencing statute where the issue has never been decided by the Court of Appeals *en banc* and where neither decision has been overruled.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below in the United States Court of Appeals for the Eighth Circuit were STEPHEN A. HENDERSON, Petitioner, represented by Richard H. Sindel, and UNITED STATES OF AMERICA, Respondent, represented by the Solicitor General of the United States.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN HENDERSON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner Stephen A. Henderson prays that a writ of certiorari be granted to review the judgment of the Eighth Circuit Court of Appeals entered in *United States v. Stephen Henderson*, Case Number 09-3326, on July 30, 2010.

OPINIONS BELOW

The judgment and opinion of the Eighth Circuit Court of Appeals in *United States v. Stephen Henderson* is printed at Appendix (hereinafter "App.") A, p. 1-17, *infra*, and the opinion is reported at 613 F.3d 1177 (8th Cir. 2010).

The Statement of Reasons for sentencing by the United States District Court in the Eastern District of Missouri was filed under seal and has not been reported.

The order of the Eighth Circuit denying rehearing and rehearing *en banc*, filed September 10, 2010, is printed at App. B, p. 1, *infra*.

JURISDICTION

The judgment and opinion of the Eighth Circuit Court of Appeals were entered on July 30, 2010, affirming Petitioner's conviction on September 22, 2009. *See* App. A, pp. 1-17.

The Court of Appeals denied a timely petition for rehearing on September 10, 2010. *See* App. B, p. 1.

On December 2, 2010, Justice Alito signed an order extending the time for filing the petition for writ of certiorari to and including January 10, 2011.

The jurisdiction of this Court to review the Judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

FEDERAL STATUTES

18 U.S.C. §922(g)(1)

(g) It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §3607

(a) If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)--(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and (2) has not previously been the subject of a disposition under this subsection; the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation.

21 U.S.C. §802(13)

As used in this subchapter: (13) The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

21 U.S.C. §841

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; (b) Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows: (1)(A) In the case of a violation of subsection (a) of this section involving— (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of— (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; or (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine

not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

28 U.S.C. §1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the

attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATE STATUTES

Mich. Comp. Laws § 333.7411

(1) When an individual who has not previously been convicted of an offense under this article or under any statute of the United States or of any state relating to narcotic drugs, coca leaves, marihuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under section 7403(2)(a)(*v*), 7403(2)(b), (c), or (d), or of use of a controlled substance under section 7404, or possession or use of an imitation controlled substance under section 7341 for a second time, the court, without entering a judgment of guilt with the consent of the accused, may defer further proceedings and place the individual on probation upon terms and conditions that shall include, but are not limited to, payment of a probation supervision fee as prescribed in section 3c of chapter XI of the code of criminal procedure, 1927 PA 175, MCL 771.3c. The terms and conditions of probation may include participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082. Upon

violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings. Discharge and dismissal under this section shall be without adjudication of guilt and, except as provided in subsection (2)(b), is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under section 7413. There may be only 1 discharge and dismissal under this section as to an individual.

RSMo 557.011 (2000)

2. Whenever any person has been found guilty of a felony or a misdemeanor the court shall make one or more of the following dispositions of the offender in any appropriate combination. The court may: (3) Suspend the imposition of sentence, with or without placing the person on probation.

STATEMENT OF THE CASE

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) because a judgment affirming the conviction of Petitioner in the United States Court of Appeals for the Eighth Circuit was entered on July 30, 2010.

On July 7, 2009, Petitioner was found guilty in the United States District Court of the Eastern District of Missouri of one count of conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §846, and distributing cocaine in

violation of 21 U.S.C. §841(a)(1). Petitioner's pre-sentence report reflected two prior felony drug offenses that had been adjudicated by Missouri Courts. PSR ¶ 29–38. The first of the two offenses was a felony for illegal possession of a controlled substance. PSR ¶ 29. The Missouri Court that accepted his plea suspended the imposition of sentence and placed Petitioner on probation for a period of one year.[1] PSR ¶ 29. Petitioner's probation was never revoked. These two drug offenses were the only criminal incidents listed in Petitioner's PSR. The probation officer calculated his guideline criminal history category at a level II.

The government filed a notice of intent to pursue an enhanced sentence pursuant to 21 U.S.C. §851 on June 16, 2009 (R: 178).[2] On the first day of trial, the government

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[1] Long-standing precedent in Missouri law makes it clear that a suspended imposition of sentence is not an appealable disposition and is not a conviction. *State v. Lynch*, 679 S.W.2d 858, 860 (Mo. 1984); *Barnes v. State*, 826 S.W.2d 74, 75-76 (Mo. App. 1992). Courts have continually relied on this precedent in accepting guilty pleas in, and the legislature has relied on this precedent as it has written and re-written felony statutes.

[2] Congress has outlined procedures in 21 U.S.C. §851 that must be followed in order for a court to apply an enhanced sentence under § 841. Section 851 requires not only that an information be filed, but also that: "the court . . . inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence . . . If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information . . . The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment . . Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have

mentioned, in the context of speaking about other issues, "that [it filed] a criminal information detailing the defendant's two prior convictions, therefore, making this case a mandatory life sentence case in the event of conviction." (T1:15) Nobody in the courtroom disputed or corrected this false representation of the applicable law, i.e. that the mere *filing of the information* made a life sentence mandatory in the event of conviction. *Id.* Additionally, the court failed to notify the defendant of his right to contest the previous convictions, and also failed to engage in any other procedures statutorily required by §851 in order to apply §841's enhanced sentencing provisions.

On appeal, Petitioner argued that the court's failure to engage in §851's required procedures was prejudicial because when the state sentencing court suspended the imposition of any sentence, this resolution could not be considered a "prior conviction for a felony drug offense" which has "become final" for purposes of §841's sentencing enhancement provisions. 21 U.S.C. §841(b). The panel rejected this argument, finding that *United States v. Craddock*, 593 F.3d 699, 701 (8th Cir. 2010) should be followed despite a previous panel holding in *United States v. Stallings*, 301 F.3d 919 (8th Cir. 2002), which had never been overruled to the effect that a suspended imposition of sentence was not a prior conviction for purposes of 21 U.S.C. §841's penalty enhancement provisions. See App. A, pp. 11-12; App. C, p. 1.[3] In *Craddock*, the court ruled that,

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the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law."

[3] An *en banc* proceeding is necessary to resolve a split within a Circuit. *See South Corporation v. United States*, 690 F.2d 1368, 1370 n.2

"to the extent that *Stallings* evinces a conflict in our precedent, 'we are free to choose which line of cases to follow.'" *Craddock*, 593 F.3d at 702 (citing *Meyer v. Schnucks Mkts., Inc.* 163 F.3d 1048, 1051 (8th Cir. 1998).[4] On appeal, Petitioner argued that the rule that a court is "free to choose" which conflicting precedent to follow should

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(1892)("If conflict appears among precedents, in any field of law, it may be resolved by the court en banc in an appropriate case."); *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247 (1953)("Rehearings en banc . . . are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern."). There has been no en banc proceeding to resolve this issue within the 8th Circuit. *See, e.g., United States v. Ortega*, 150 f.3d 937 (8th Cir. 1998)(panel decision); *United States v. Franklin*, 250 F.3d 653, 665 (8th Cir. 2001)(same); *Stallings*, 301 F.3d at 919 (same); *United States v. Maxon*, 339 F.3d 656, 659 (8th Cir. 2003)(rehearing en banc denied)(same); *United States v. Slicer*, 361 F.3d 1085, 1087 (8th Cir. 2004)(same); *Craddock*, 593 F.3d at 701 (same); *United States v. Henderson*, 613 F.3d 1177 (8th Cir. 2010)(same). Since one panel is powerless to overrule the decisions of another panel, both lines of decision remain valid precedent within the Eighth Circuit. *See United States v. Betcher*, 534 F.3d 820, 823-24 (8th Cir. 2008).

[4] *Craddock* relied largely on a previous Eighth Circuit Court of Appeals case that attempted to distinguish *Stallings* from *Ortega*, 150 F.3d at 948, on the ground that the court had not reached the finality issue in that case. *See Maxon*, 339 F.3d at 659. However, this distinction is misleading. 21 U.S.C. §841 requires a "final conviction" for purposes of the statute. Thus, if a defendant can prove that that there is either: (1) no prior conviction; or (2) a prior conviction is not yet final, the prior proceeding cannot be used for enhancement purposes under the statute. *Ortega* held that a suspended imposition of sentence was a final conviction for the purposes of the statute. *Ortega*, 150 F.3d at 948. *Stallings*, however, held that a state law suspended imposition of sentence was not a conviction for the purposes of the federal statute, eliminating any need to address the finality issue. *Stallings*, 301 F.3d at 922. The finality issue was thus moot in *Stallings* once the court determined that no conviction existed. *Id.*

not be applied in a criminal context because lenity and due process require that the court accept the statutory interpretation that is more favorable to the defendant. The court of appeals ignored this argument in issuing its opinion.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari on the question of whether a prior Missouri disposition resulting in a one year suspended imposition of sentence, which is not an appealable disposition and which under Missouri law is not considered "a conviction," ought to be considered a "prior conviction for a felony drug offense" which has "become final" for purposes of the penalty enhancement provision of 21 U.S.C. §851(b), which increases the mandatory minimum sentence from ten or twenty years to one of life imprisonment without the possibility of parole.

A. This Court should grant certiorari on the question because the panel decision is in conflict with decisions of the Eighth, Ninth and Tenth Circuit Courts of Appeals and other lower courts.

A number of courts of appeals have ruled that suspended sentences not resulting in convictions under state law should not be considered convictions for purposes of federal statutes. In *Stallings*, 301 F.3d at 922, the Eighth Circuit specifically held that when the state sentencing court suspends the imposition of any sentence,

it is not a conviction for purposes of 21 U.S.C. §841(b). In *Stallings*, the defendant had been charged with a prior drug offense in California to which he pled guilty and was placed on probation, but imposition of sentence was suspended, and no judgment was ever entered against him. *Id.* at 922 (citing *United States v. Qualls*, 108 F.3d 1019 (9th Cir. 1993)). In ruling that this disposition could not be considered a conviction for purposes of the application of the provisions of 21 U.S.C. §841(b) and the draconian punishments embodied therein, the court looked to California law. *Id.* Because the probationary period had passed and the defendant's probation had not been revoked, the court ruled that there was no judgment of conviction, and the defendant "[did] not have a final or pending judgment against him in California." *Id.* The Court emphasized an important distinction in California state law that is also present in Missouri law: "[W]hen a sentencing court grants probation after a conviction, it may suspend the imposition of sentence, in which case no judgment of conviction is rendered, or it may impose sentence and order its execution to be stayed. In the latter case only, a judgment of conviction is rendered." *Id.* (citing *United States v. Robinson*, 967 F.2d 287 (9th Cir.1992)). *Stallings* has never been overruled.

The decision below is also in conflict with decisions in the Ninth and Tenth Circuits' holdings that state law deferred-adjudication dispositions cannot be considered convictions for purposes of applying federal law. In *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 811-12 (9th Cir. 2009) and *Rice v. Holder*, 597 F.3d 952, 956-57 (9th Cir. 2010), the Ninth Circuit ruled that certain adjudications under state rehabilitative statutes aimed at first-time offenders could not be considered for purposes of

deportation statutes. Likewise, in *United States v. Stober*, the Tenth Circuit ruled that a deferred adjudication under an Oklahoma state statute was not a conviction for purposes of a federal receipt of a firearm. 604 F.2d 1274 (10th Cir. 1975).[5]

Though these cases involve different federal statutes, they directly contradict the holding of the panel in this case because they reflect an entirely different meaning of the term "conviction" and how it should be interpreted for purposes of the application of federal statutes than that reached by the panel decision in this case. In *Ramirez-Altamirano*, the court considered the effect of a provision under 18 U.S.C. §3607[6] establishing that an adjudication

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[5] At least one district court in the Tenth Circuit has applied *Stober* in the context of §841, finding that absent a final judgment, there was no previous conviction and thus the enhanced penalty provisions of §841(b) did not apply. *U.S. v. Alvarado*, 458 F.Supp.2d 1266 (D.N.M. 2006). Despite these decisions in the Eighth, Ninth, and Tenth circuits, a number of other circuit panels have ruled that suspended sentences should be considered convictions for purposes of §841. *See United States v. Cisneros*, 112 F.3d 1272, 1280 (5th Cir. 1997); *United States v. Mejias*, 47 F.3d 401, 402 (11th Cir. 1995); *United States v. Gomez*, 24 F.3d 924 (7th Cir. 1994) at 927- 28.) *But See United States v. Meraz*, 998 F.2d 182, 184 (3d Cir. 1993) (The prior offense was considered a conviction only because it was an appealable order.)

[6] "(a) Pre-judgment probation.--If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)--
(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and
(2) has not previously been the subject of a disposition under this subsection;
. . . the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of

under §3607, which is essentially the equivalent of a state-law suspended imposition of sentence, ought to not be considered a conviction "for any purpose." 563 F.3d at 807. The court determined that the Equal Protection Clause required that it apply the same rule to state-law adjudications that were analogous to a federal adjudication under §3607. *Id.*[7]

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probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

(b) . . . A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose."

[7] Petitioner has found no case evaluating whether a prior adjudication pursuant to 18 U.S.C. §3607 is considered a prior conviction for purposes of §841, but the plain language of the statute is clear that it should not be. 18 U.S.C. § 3607(b)("A disposition under subsection (a) ... shall not be considered a conviction for the purpose of a disqualification or disability imposed by law upon conviction of a crime, or for any other purpose."). Significantly, the disposition of Petitioner's case in Missouri was almost identical to what is defined in §3607. Petitioner pled guilty to a drug possession offense and received a suspended imposition of sentence, which under the law of the court in which he was convicted was not considered a final judgment or conviction. *See Lynch*, 679 S.W.2d at 860; *Barnes*, 826 S.W.2d at 75-76.

Ramirez-Altamirano and the other Ninth Circuit cases that follow its holding present an almost identical question as the one that is presented today, and one that is clearly encompassed by it; i.e., where a state statute provides for an adjudication which is the exact equivalent of the disposition provided for in §3607, should federal statutes that prescribe collateral consequences on the basis of prior convictions treat a disposition under that state statute in the same manner as they are required to treat a disposition under §3607? There is a clear circuit split on this issue. While the Ninth Circuit has repeatedly and consistently answered "yes" on equal protection grounds (*see Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9th Cir. 2000); *Paredes-Urrestarazu v. U.S. I.N.S.*, 36 F.3d 801 (9th Cir. 1994); *Garberding v. I.N.S.*, 30 F.3d 1187 (9th Cir. 1994)), a number of other circuits have disagreed. *See Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157-58 (10th Cir. 2006); *Resendiz-Alcaraz v. Ashcroft*, 383 F.3d 1262, 1266-71 (11th Cir. 2004); *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 328-31 (5th Cir. 2004); *Acosta v. Ashcroft*, 341 F.3d 218, 222-27 (3d Cir. 2003); and *Gill v. Ashcroft*, 335 F.3d 574, 577-79 (7th Cir. 2003).

Similarly, in *Stober*, the Tenth Circuit ruled that because state law did not recognize a deferred adjudication as a conviction, it should not be recognized as such for purposes of 18 U.S.C. §922(h), which made possessing a firearm a crime if committed by a person who had been previously convicted of a defined set of crimes "in any court." The court stated:

> Thus under the decisions of the Oklahoma state court, the defendant was not convicted in the state court during that state proceeding which became an

> element in the federal charge here considered. There was no conviction in the Oklahoma state courts, and no determination of guilt, says Oklahoma law. The fact that there was no determination of guilt would seem to be significant, together with the admonitions in the statute that no judgment be entered, and the procedure whereby the plea is not acted upon. The evaluation and characterization of its own proceedings by the state should be determinative. The state is free to attach what consequences it wishes to violations of its laws. If the defendant Stober does not stand convicted in Oklahoma by the Oklahoma courts before whom the proceedings were had, it is difficult to see how the federal court can hold that he was convicted in the Oklahoma courts for to do so is to have him convicted by the federal court.

Id. at 1276.

Even though there was a plea of guilty, the court made no findings of guilt. Any distinction from the Petitioner's state court proceedings is a matter of semantics more than a distinction of substance. The Court further went on to emphasize that the words "in any court" signified the legislature's intent that the court that adjudicated the original case should be the court that determined whether there was a conviction or not.[8]

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[8] Significantly, *Stober* was overruled in *Dickerson v. New Banner Inst. Inc.*, 460 U.S. 986, 991 n.6 (1983), but the legislature later superseded that decision by statute, indicating its intent that state, not federal law, govern what was considered a conviction. 18 U.S.C. § 922(g)-(h).

Stober is in direct conflict with the decision of the Eighth Circuit panel in this case because §841 presents a much stronger case for interpreting the term "conviction" in light of state law than did §922. An important difference between §922 and §841 is that §922 defines the underlying offense one must be convicted of in broad terms that can easily apply in any jurisdiction. Under §922(g)(1), the relevant conviction is for a crime "punishable by imprisonment of a term exceeding one year." 18 U.S.C. § 922(g)(1). Whereas under §841, the relevant conviction is for any felony, which is defined as, "[a]ny Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. §802 (13). Section §841 thus requires reference to state law in defining a felony itself. It only makes sense then that it would also rely on state law in defining the entire term "felony conviction."

Finally, the panel's decision conflicts with the decision in *Gubbels v. Hoy*, 261 F.2d 952, 954-55 (9th Cir. 1958), wherein the Ninth Circuit ruled that an adjudication by court martial could not be considered a conviction under 8 U.S.C. §1251(a)(4)(now codified at 8 U.S.C. §1227(2)(A)(1). The Court argued that certain protections contemplated by the statute were simply not available in a military tribunal proceeding and thus the harsh collateral consequence of deportation ought to not apply. *Id.* at 954-955. "[N]ot all of the constitutional guarantees extended to defendants prosecuted in civil courts are available to an accused tried by a military tribunal." Thus the harsh collateral consequences associated with a conviction should not be applied. *Id.* at 955. *Hoy* contradicts the decision of the panel in Petitioner's case because an adjudication under Missouri statutes providing for a suspended imposition of sentence similarly does not carry with it the guarantees

generally associated with civil court proceedings because there is no right to appeal such an adjudication in Missouri. *Lynch*, 679 S.W.2d at, 860; *Barnes*, 826 S.W.2d at 75-76.

What *Hoy, Stober, Stallings*, and *Ramirez-Altamirano* and the many cases that follow their holdings represent is the entirely reasonable concept that the courts, judges, attorneys and participants in a system within a particular jurisdiction are best able to determine to the true meaning of a guilty plea to a certain disposition within that jurisdiction. Underlying all of these cases is the acknowledgment of the very practical reality that a defendant's decision to plead guilty is often based largely not on his understanding of his guilt or innocence but on the probable consequences he will face if he pleads guilty when evaluated against the costs, consequences and risks of taking his case to trial, and what his attorney tells him the consequences will be. The Supreme Court itself has acknowledged this fact by allowing judges to accept pleas of guilt despite protestations of innocence. *North Carolina v. Alford*, 400 U.S. 25 (1970). This is not to say that a plea of guilty should have no consequences. It is only to point out that the many lower court decisions which look to state law in attempting to decipher the meaning of the word "conviction" have a sound basis in both logic and law. This Court should grant certiorari and provide lower courts with clarity and guidance on this issue.

B. This Court should grant certiorari because this is an important question that requires clarity from this Court because it affects a large number of people in a significant manner.

Implicit in a defendant's decision to plead guilty is the assumption that the sentence or outcome will be more lenient than if the defendant had been convicted at trial. In 1994, felony drug possession convictions in state courts were the product of a guilty plea in 94 percent of cases. Brian Ostrom and Neal Kauder, Drug Crime: the Impact on State Courts, Nat'l Ctr. for State Courts 5, (1999), at http://www.ncsconline.org/D_Research/csp/Highlights /DrugsV5%20No1.pdf (citing Felony Sentences in State Courts, U.S. Department of Justice, Bureau of Justice Statistics (1994)). Many states have provisions that attempt to limit the disparate impact and the stigma associated with a first-time felony conviction, making the defendants much more apt to plea than take a chance at trial. In Missouri, this occurs when imposition of sentence is suspended. As previously established *supra*, the resulting disposition is not considered a "conviction" under state law. *Lynch*, 679 S.W.2d at 860. Similarly, in California, when a court grants probation after a conviction, the trial court may suspend the imposition of sentence and no judgment of conviction is entered. *People v. Arguello*, 59 Cal.2d 475, 476 (Cal. 1963). Many other states have similar provisions. See *Hunter v. Commonwealth*, 695 S.E.2d 567, 569 (Va. App. 2010)(suspended imposition of sentence coupled with probation is "act of grace" on part of Commonwealth and legislature has afforded trial courts wide latitude in "fashioning rehabilitative programs for defendants"); *State of South Dakota v. Moeller*, 388 N.W.2d 872, 872 (S.D. 1986)("trial court, by an [o]rder [s]uspending [i]mposition of [s]entence, did not enter a judgment of conviction on the . . . offenses"); *Hall v. State of Alaska*, 145 P.3d 605, 607 (Alaska App. 2006)("Hall received a suspended imposition

of sentence for [his] crime, and his conviction was set aside at the end of a year's probation"); *Todd v. State of Texas*, 598 S.W.2d 286, 291 (Tex. Cr. App. 1980)(when judgment is suspended, conviction only becomes final when probation is revoked); Mich. Comp. Laws § 333.7411(when an individual who has not previously been convicted of an offense under this article . . . pleads guilty to . . . possession of a controlled substance . . . the court, without entering a judgment of guilt, may defer further proceedings and place the individual on probation . . . discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction). Most states have similar provisions designed to afford first-time offenders the benefit of the doubt in simple drug possession cases. States choose to adopt these types of laws in order to give its citizens a second chance.

Under several panel decisions in many circuits regarding the federal enhancement statute for prior convictions, there is no second chance. *See United States v. Cisneros*, 112 F.3d 1272, 1280 (5th Cir. 1997); *United States v. Mejias*, 47 F.3d 401, 402 (11th Cir. 1995); *United States v. Gomez*, 24 F.3d 924, 927-28 (7th Cir. 1994). *But See United States v. Meraz*, 998 F.2d 182, 184 (3d Cir. 1993) (The prior offense was considered a conviction only because it was an appealable order.) Any person convicted under 21 U.S.C. §841 who has pled guilty to a state felony possession charge will spend a minimum of 20 years in prison, and maybe even a lifetime, because these panels have held that federal law should govern the term "prior conviction" and that interpretation includes all suspended sentences and guilty pleas under state law, even though Congress has not specifically spoken on this issue and the relevant state law directly contradicts the punitive application of the enhanced sentences.

The issue presented in this case is of worthy of review for several reasons. First, the prosecution of many drug offenders is discretionary and can be subject to either state or federal jurisdiction. State cases may therefore be transferred to federal prosecutors in order to subject defendants to exorbitantly stiffer penalties or facilitate the forfeiture of various assets. *See* 21 U.S.C. §881. For example, as a direct result of the takeover of drug prosecutions, the average time expected to be served in federal prison for drug offenses between 1988 to 2002 has increased from 39.3 months to 62.4 months. Bureau of Justice Statistics, Federal Criminal Case Processing, 2002 (January 2005), NCJ 207447 1, at http://bjs.ojp.usdoj.gov/content/ pub/pdf/fccp02.pdf. Second, as discussed *supra*, I, state laws that provide second opportunities for citizens are vitiated under the current rulings of several circuits. This is not an isolated issue related solely to Petitioner, but rather an important and fundamental principle that will undoubtedly affect thousands of drug offenders. Petitioner respectfully requests that this Court step in to resolve this issue.

C. This is an issue of vital importance that requires clarity from this Court because it has fundamental statutory and constitutional implica-tions.

In 18 U.S.C. §3607, the federal government has created its own version of a suspended imposition of sentence and made specific provisions requiring that such a disposition "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." This provision reflects the federal government's sound decision

to not count certain dispositions in applying the many collateral consequences convictions impose under federal law.

A federal court's failure to recognize similar decisions by state governments carries constitutional implications for a number of reasons. First, and as explained herein, it raises due process concerns because it applies the stricter of two interpretations of the statute, without any legislative guidance as to why it should do so. As already discussed, 21 U.S.C. §841(b) does not contain a definition of " prior conviction for a felony drug offense which has "become final" for purposes of the statute, and judicial decisions have established conflicting case law on this issue. Therefore, due to the conflicting precedent, the Courts have failed to make the scope of the statute "reasonably clear." As such, criminal defendants and attorneys have no fair notice regarding the correct interpretation of the statute within the circuit, or for that matter, nationwide. *United States v. Bass*, 404 U.S. 336, 348 (1971)(discussing 18 U.S.C. §922(g) and felons in possession of firearms). Second, it raises equal protection concerns because it draws an irrational line between people who were prosecuted for drug possession offenses federally and whose cases were adjudicated pursuant to §3607 from those who were prosecuted at the state level, and received almost identical dispositions under the state statutes. See *Lujan-Armendariz*, 222 F.3d at 728; *Paredes-Urrestarazu*, 36 F.3d at 801; *Garberding*, 30 F.3d at 1187.

Finally, the question raises fundamental concerns under 28 U.S.C. §1738, which requires that all acts of state courts, "shall have the same full faith and credit in every court within the United States and its Territories and

Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." *See also In re Genesys Dataechnologies, Inc.*, 204 F.3d 124 (4th Cir. 2000)(certified question answered, 95 Haw. 33, 18 P. P.3d 895 (2001)). The federal courts' failure to recognize a state court's interpretation of its own actions when it suspends the imposition of any sentence under Missouri and other states' laws is a clear violation of the federal government's obligations under 28 U.S.C. §1738.

D. This is an issue of vital importance that requires clarity from this Court because the decision is in conflict with generally accepted concepts of law and justice.

It is a generally recognized proposition of law that when interpreting contracts, the expectations of the parties govern the subsequent interpretation of the meaning of certain terms. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 217 (1985) (performance of a contract requires faithfulness and consistency with the justified expectations of the other party)(citing *Restatement (Second) of Contracts* § 205 (1981)). The decision below negates this principal by failing to uphold the understanding of the law that all parties to the original adjudication had with regard to the legal definition and consequences of a suspended imposition of sentence. While contract law is not criminal law, the same principles of justice are generally applicable with regard to statutory interpretation:[9] The parties' understanding of

[9] Similarly in conflict of laws, there exists the oft-applied concept that that law governs which had the nearest relationship to the transaction in issue. Restatement (Second) of Conflict of Laws § § 7,8. Applied here, the meaning of a state conviction ought to apply to state law.

the terms applies, and when there is doubt, laws, like contracts, are to be interpreted in favor of the non-drafting party.[10] *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995)(common law rule of contract interpretation is that a court should construe reasonable meanings of a term against the interest of the drafting party); *see also Restatement (Second) of Contracts* § 206 (1981). These general principles would require that where a federal court attempts to decipher the meaning of an action in state court, it must look to state law because that is the law that, whether by statute or judicial act, governed the action itself, and which best establishes the parties' expectations and intents. However, this general principal of the law, applied by many lower courts, is ignored in the decision below and by similar decisions of many circuit courts. The lower courts require clarity on this issue.

E. This Court should grant certiorari on this question because the decision of the panel conflicts with decisions of this Court.

This court has repeatedly ruled that where a court is deciding on conflicting statutory interpretations, lenity should apply. *Moskal v. United States*, 498 U.S. 103, 131

And in a civil action based on diversity of citizenship, a federal court must apply the statutory and common law of the state in which it sits. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938). Applied here, the federal court should apply the law of the state in which the court sits i.e. Missouri law.

[10] The second part of this proposition is encompassed by the rule of lenity which, significantly, the Eighth Circuit failed to adopt in choosing between conflicting statutory interpretations or conflicting precedents. *See infra*, III.

(1990)(Scalia, J., dissenting); *United States v. Gradwell*, 243 U.S. 476, 485 (1917); *Bass*, 404 U.S. at 348. This means that in order for a Court to adopt the harsher interpretation, Congress must, "have spoken in language that is clear and definite." *Id.* (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)(internal quotations omitted). This Court has also made it clear that the principle of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980). "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958). In this case, not only was there conflicting precedent within the Eighth Circuit as to the meaning of "prior conviction for a felony drug offense" which has "become final" under §841(b), but there is also specific federal law as encompassed by §3607 clearly stating that a disposition on a drug possession case that does not result in a judgment should not be considered a conviction for "any purpose." 18 U.S.C. §3607. If Congress provided any clarity as to how Petitioner's state court disposition should be treated for purposes of this and other statutes imposing consequences of convictions, it did so in drafting §3607. Thus to the extent legislative language provided clarity, it implied that when a Missouri court suspends the imposition of a sentence, this decision cannot be considered a conviction. The decision of the panel is clearly in contravention to this court's rule of lenity.

II. This Court should grant certiorari on the question of whether the due process clause requires a court to apply the rule of lenity in choosing between conflicting precedents of that court with regard to the interpretation of a sentencing statute where the issue has never been decided en banc by the court of appeals with jurisdiction and where neither decision has been overruled.

A. This Court should grant certiorari with regard to this issue because courts of appeals and district courts need guidance on how to apply conflicting precedents in criminal cases.

Two panels of the Eighth Circuit ruled on the issue of whether a Missouri suspended imposition of sentence can be considered a conviction for purposes of §841(b) and the panels that have decided not to follow the rule announced in *Stallings* have done so primarily on the serendipitous proposition that, "under the rules of this circuit, we are 'free to cho[o]se which line of cases to follow." *Slicer*, 361 F.3d at 1087 n 1 (citing *Maxon*, 339 F.3d at 659); *Kostelec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220, 1228 n. 8 (8th Cir.1995)); *Craddock*, 593 F.3d at 702 (citing *Meyer*, 163 F.3d at 1051. Significantly, this rule was not developed in the context of criminal law, but was simply lifted from a maxim originally espoused in civil appeals. When first applying this rule in the context of this conflict, the Eighth Circuit engaged in no analysis as to the applicability of the rule in the criminal context and whether specific rights and requirements relevant only in the context of a criminal proceeding require that a different standard apply in

choosing between conflicting precedents. *Id.* A criminal defendant's constitutional due process rights require that a criminal statute give a defendant fair warning of proscribed conduct and sufficient clarity as to the consequences of violating a criminal statute. *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964); *U.S. v. Batchelder*, 442 U.S. 114, 123 (1979). The due process rights of a criminal defendant and the rule of lenity do not apply in the context of civil law, and as such the rule for choosing between conflicting precedents in a criminal case requires a different analysis than in the civil context. There is significant split among the circuits and other lower courts as to what rule the Circuit court should apply when precedents conflict on an issue on which neither the en banc court with jurisdiction nor the United States Supreme Court has spoken. There is some state court authority that if there are conflicting precedents, it is the court's duty to follow the decision that it perceives is based on the sounder reasoning. *Meade v. Com.*, 282 S.W. 781, 783 (1926); *Hammock v. State*, 46 S.W.3d 889, 892 (Tex. Crim. App. 2001). Circuit courts have held that the earlier opinion controls and is binding precedent. *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 425 (5th Cir. 2006)(petition for cert. filed, 75 U.S.L.W. 3001, 75 U.S.L.W. 3023 (U.S. June 23, 2006)); *European Community v. RJR Nabisco, Inc.*, 424 F.3d 175, 179 (2d Cir. 2005)(cert. denied, 126 S. Ct. 1045, 163 L. Ed. 2d 858 (U.S. 2006)); *Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 75 (1st Cir. 2005). Some circuit courts have held that the earlier precedent should be followed if it was settled precedent, as opposed to a subsequent deviation from it. *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1323 n. 2 (11th Cir. 2006); *U.S. v. Rodriguez-Aguirre*, 414 F.3d 1177, 1185 n. 10 (10th Cir. 2005). Still other state courts have asserted that it is the last impression that is

controlling. *Jolley v. Clemens*, 82 P.2d 51, 60-61 (4th Dist. 1938). *Parker v. Plympton*, 273 P. 1030, 1034 (1928); *Hornsby v. State*, 163 N.E. 923, 924 (1st Dist. Hamilton County 1928); *Bruner v. Automobile Ins. Co. of Hartford, Conn.*, 164 S.E. 134 (1932). Significantly, these rules have been developed almost exclusively in the context of civil litigation. Also, none of these cases have addressed the specific requirements of fair notice, lenity, and whether due process requires a different rule in the criminal context.

The Supreme Court has traditionally rejected cases where the reason for granting certiorari had to do with an intra-circuit conflict. *Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 901,902 (1957)("[I]t is primarily the task of a Court of Appeals to reconcile its internal difficulties."). As such, the Supreme Court has provided lower courts and courts of appeals with no guidance on the question of whether there are any due process implications if a panel of the court decides to follow the harsher of two conflicting precedents in a criminal case.

B. This Court should grant certiorari on this question because the practice of the Eighth Circuit and other circuits directly contradicts the requirement that the rule of lenity be considered in resolving conflicting interpretations of criminal statutes.

Although the rule of lenity traditionally applies to ambiguity within statutes, the rationale behind the rule, that due process requires fair notice to the defendant of the consequences of his actions, necessitates that lenity also apply to conflicting case-law precedent when both are

reasonable interpretations of the statute at issue. The decision of the panel in this case thus contradicts the statements of law by this Court in *Gradwell*, 243 U.S. at 485; *Bifulco*, 447 U.S. at 387; *Ladner*,, 358 U.S. at 178; *Bouie*, 378 U.S. at 350-51, and *Bass*, 404 U.S. at 348.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 09-3326

United States of America,

Plaintiff - Appellee

v.

Stephen Henderson,

Defendant - Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:08-cr-00187-CAS-2)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 30, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-3326

United States of America,

Appellee,

v.

Stephen Henderson,

Appellant.

Submitted: June 16, 2010
Filed: July 30, 2010

Appeal from the United States
District Court for the
Eastern District of Missouri.

Before MURPHY, BEAM, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

A jury convicted Stephen Anthony Henderson of conspiring to distribute, and possessing with the intent to distribute, in excess of five kilograms of cocaine, and distributing over five kilograms of cocaine, in violation of U.S.C. §§ 841(a)(1), 846, and 851(a). The district court1 sentenced him to life imprisonment. He appeals, arguing that the district court erred in (1) denying his motion to suppress evidence and statements, (2) admitting evidence of prior convictions and bad acts, (3) limiting defense questioning at trial, (4) sentencing under 21 U.S.C. § 841 without properly following 21 U.S.C. § 851, and (5) refusing to allow his previous counsel to testify. Having jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, this court affirms.

I.

On March 5, 2008, Henderson delivered 10 kilograms of cocaine to a confidential informant. Drug Enforcement Agency (DEA) agents witnessed Henderson retrieve a black bag containing cocaine from a house on Bon Jour Court. He and the informant then drove to another residence. Violating the agents' instructions, the informant took the bag inside the house as Henderson left. The informant then met the investigators and gave them the bag, containing five kilograms of cocaine. The next day, the informant admitted he placed in the house an additional five kilograms, which the agents retrieved.

On March 10, 2008, based on this drug sale and other recorded conversations, agents arrested Henderson at an apartment on Seiloff Drive, without a warrant. He consented to a search of the apartment, directing agents to a closet with a duffel bag containing $256,575. They also conducted a warranted search of the Bon Jour house, finding a drug ledger and $948,080.

Later that day, at the DEA office, he told the agents, "This is much bigger than you guys think." He named six drug customers who owed him money. Henderson cooperated in the investigation by wearing a recorder while retrieving a money counter from his supplier, "the biggest dope dealer in St. Louis."

The next day, he and two agents met with his then-attorney, who claimed that one agent asked if he "could live with" a sentence of "a year or so." The agent denied making this statement. Pre-trial, the district court excluded the attorney's testimony. The court also denied Henderson's motion to suppress evidence and statements obtained after his arrest.

The government filed an information listing his two prior convictions, requiring a life sentence. At trial, the informant and another witness testified that the drug conspiracy began in 2007. The Government sought to introduce evidence of a 1993 felony conviction. The district court instructed the jury on the 1993 conviction for selling cocaine and (initially) on a 1989 felony conviction for possessing cocaine. The court immediately corrected the instruction, stating, "Oops. Let me say this, it was only one conviction, and that conviction was for the sale of cocaine,

not the other [one for possession]. So I'll start again, and so keep that in mind." The court also restricted the Government's questioning about Henderson's failure to file income taxes but did not instruct the jury to disregard the testimony.

At sentencing, Henderson received the statutory minimum of life imprisonment based on two prior felony convictions.

II.

A.

Henderson first argues that the district court erred in denying his motion to suppress evidence and his statements because the DEA agents lacked probable cause to arrest him. Usually, "the denial of a pretrial motion to suppress evidence preserves the objection for appeal." ***United States v. Johnson***, 906 F.2d 1285, 1290 (8th Cir. 1990). But "this court has found pretrial objections waived when an appellant's counsel affirmatively stated 'no objection' at trial to the admission of evidence previously sought to be suppressed." ***United States v. Gonzalez-Rodriguez***, 239 F.3d 948, 951 (8th Cir. 2001).

He seeks to suppress only evidence and statements obtained at the Seiloff apartment. At trial, his counsel stated "no" when asked for "any objection" to admitting the physical evidence. Counsel later waived objection to admitting the $256,575 seized from the apartment. Henderson thus "consciously and intentionally waived any objection to the district court's receipt of the evidence at issue in his pretrial suppression motion." ***United States v.***

Comstock, 531 F.3d 667, 675 (8th Cir. 2008) (internal quotation omitted) (defendant waived motion to suppress when "each time the Government moved to admit evidence, defense counsel stated 'no objection'").

Henderson did preserve his motion to suppress the statements. But his motion fails when reviewing the "district court's factual findings for clear error and its legal conclusions de novo." *See* ***United States v. Williams***, 431 F.3d 1115, 1117 (8th Cir. 2005). "Because this case proceeded to trial, we examine the entire record, not merely the evidence adduced at the suppression hearing." ***United States v. Inman***, 558 F.3d 742, 745 (8th Cir. 2009).

He claims that an intervening exculpatory act destroyed probable cause for his arrest. *See* ***United States v. Watson***, 423 U.S. 411, 449 (1976) (Marshall, J., dissenting) (noting that "probable cause to arrest, once formed, will continue to exist for the indefinite future, at least if no intervening exculpatory facts come to light"); ***Wong Sun v. United States***, 371 U.S. 471, 484–88 (1963) (explaining that if the police gain information that destroys probable cause, then statements made as a result of that information cannot be admitted). "Probable cause exists when, at the time of the arrest, the available facts and circumstances are sufficient to warrant a person of reasonable caution to believe that an offense was being or had been committed by the person to be arrested." ***United States v. Martinez***, 462 F.3d 903, 908 (8th Cir. 2006); *see* ***United States v. Quiroga***, 554 F.3d 1150, 1154 (8th Cir. 2009). "[B]ecause the*totality* of circumstances determines the existence of probable cause, evidence that tends to negate the possibility that a suspect has committed a crime is relevant to whether the officer has probable cause."

Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999) (emphasis in original) (probable cause was destroyed when an officer ignored exculpatory evidence that the suspect was really the victim in the altercation, and refused to interview a witness who could corroborate the suspect's statement).

Henderson conjectures that when the informant disobeyed instructions by entering the house, he could have placed five kilograms of cocaine in the bag himself. The next day, Henderson continues, he delivered the additional five kilograms stored in the basement because he wanted to ensure Henderson received life imprisonment. This intervening act, he asserts, destroyed probable cause.

Law enforcement officers have "substantial latitude in interpreting and drawing inferences from factual circumstances." ***United States v. Washington***, 109 F.3d 459, 465 (8th Cir. 1997). DEA agents witnessed what they reasonably believed was a drug transaction and possessed recorded conversations about Henderson's dealings. These circumstances were sufficient to arrest Henderson. *See* ***United States v. Brown***, 49 F.3d 1346, 1349–50 (8th Cir. 1995) (probable cause existed where officers witnessed what an informant claimed was a drug transaction). Following his arrest, Henderson waived his *Miranda* rights and consented to a search of the Seiloff apartment. No intervening exculpatory act destroyed probable cause. The district court properly concluded that his statements were not subject to the exclusionary rule.

He also asserts that his statements should have been suppressed because he was not presented to a neutral, independent magistrate to determine probable cause for his

arrest. But he raises this argument for the first time on appeal. "Federal Rule of Criminal Procedure 12(b)(3)(C) and (e) provides that motions to suppress evidence must be raised before trial or are waived, and the waiver provision applies not only to the failure to make a pretrial motion, but also to the failure to include a particular argument in the motion." ***United States v. Spotted Elk***, 548 F.3d 641, 656 (8th Cir. 2008) (internal quotation omitted); *see* **Fed. R. Crim. P. 12(e)** ("A party waives any Rule 12(b)(3) [motion to suppress] defense . . . not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides."). By not raising this suppression argument below, Henderson waived the claim, rendering it "unreviewable on appeal." ***United States v. Booker***, 576 F.3d 506, 511 (8th Cir. 2009).

B.

Henderson next argues that the district court should have excluded evidence of the 1993 conviction for selling cocaine. This court reviews "a district court's decision to admit evidence under Federal Rule of Evidence 404(b) for abuse of discretion and reverse[s] only when such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts." ***United States v. Thomas***, 593 F.3d 752, 757 (8th Cir. 2010) (internal quotation omitted). District courts can admit 404(b) evidence of a prior conviction in order to prove intent or knowledge. ***United States v. Trogdon***, 575 F.3d 762, 766 (8th Cir. 2009). The prior conviction must be "(1) relevant to a material issue; (2) similar in kind and not overly remote in time to the crime charged; (3) supported by sufficient evidence; and (4) higher

in probative value than prejudicial effect." ***United States v. Williams***, 534 F.3d 980, 984 (8th Cir. 2008).

According to Henderson, his 1993 conviction was too remote and more prejudicial than probative. "The inquiry regarding the remoteness of a prior conviction is fact specific" and based on a reasonableness standard. ***United States v. Mejia-Uribe***, 75 F.3d 395, 398 (8th Cir. 1996); ***United States v. Abumayyaleh***, 530 F.3d 641, 650 (8th Cir. 2008). "There is no absolute rule regarding the number of years that can separate offenses." ***Thomas***, 593 F.3d at 758. This court need not decide, however, whether the 1993 conviction was too remote because the conviction was more prejudicial than probative, and the test for 404(b) admissibility is conjunctive.

If the government already has significant evidence of drug transactions, admitting a prior conviction may be more prejudicial than probative. *Compare* ***Mejia-Uribe***, 75 F.3d at 398–99 (prior conviction for a single sale of cocaine was inadmissible where the present conviction involved "a large-scale, ongoing operation") *and* ***United States v. Carroll***, 207 F.3d 465, 469 (8th Cir. 2000) (prior robbery conviction was "too generic and remote" to be admissible), *with* ***United States v. James***, 564 F.3d 960, 962–63 (8th Cir. 2009) (prior conviction for a similar drug offense was admissible where "knowledge and intent were relevant issues" because defendant's "mere presence defense" placed his state of mind in question) *and* ***United States v. Washington***, 318 F.3d 845, 859 (8th Cir. 2003) ("Evidence of other drug transactions is relevant to demonstrate that the defendant knowingly and intentionally participated in a conspiracy and was not merely an unwitting or uninvolved bystander.") (quotation omitted). In *Mejia-Uribe*, a 1978

conviction for an isolated cocaine sale "pale[d] in comparison with the other evidence produced by the government to show knowledge and intent" of the ongoing drug conspiracy. The conviction was more prejudicial than probative, showing little more than the defendant's "propensity to commit this type of crime." ***Mejia-Uribe***, 75 F.3d at 399.

As in *Mejia-Uribe*, the Government here presented significant evidence linking Henderson to the ongoing drug conspiracy that began in 2007. Two co-conspirators and nine investigators testified about his involvement with the conspiracy. "[T]he jury received . . . highly probative evidence of [his] knowledge and intent." ***Id.*** Introduction of the 1993 conviction for a single sale of cocaine was thus more prejudicial than probative.

This court "will not reverse a conviction if an error was harmless." ***United States v. Donnell***, 596 F.3d 913, 919 (8th Cir. 2010). "The test for harmless error is whether the erroneous evidentiary ruling had a substantial influence on the jury's verdict." ***Id.*** (quotation omitted). *See* ***United States v. LeCompte***, 99 F.3d 274, 279 (8th Cir. 1996) ("The evidence supporting conviction was by no means overwhelming, so the admission of highly prejudicial Rule 404(b) evidence cannot be dismissed as harmless error."); ***Mejia-Uribe,*** 75 F.3d at 399 ("The government's case against Uribe was overwhelming . . . [and] [t]herefore introduction of the 1978 conviction did not have substantial and injurious effect or influence in determining the jury's verdict.") (quotation omitted). Evidence against Henderson was considerable. His 1993 conviction was merely "cumulative of other evidence establishing [his] knowledge

and intent to participate in the conspiracy." ***Id.*** Introduction of the conviction was harmless error.

He also alleges that the district court abused its discretion by not instructing the jury to disregard the mention of his 1989 conviction for cocaine possession. The court immediately corrected the instruction: "Oops. Let me say this, it was only one conviction, and that conviction was for the sale of cocaine, not the other [one for possession]. So I'll start again, and so keep that in mind." Such a limiting correction
or instruction "mitigates concerns of prejudice." ***United States v. Ragland***, 555 F.3d 706, 715 (8th Cir. 2009); *see* ***United States v. Hester***, 140 F.3d 753, 758 (8th Cir. 1998) (district court's immediate "curative instruction, admitting that it misspoke" corrected the error). The district court did not abuse its discretion.

Henderson further objects to the district court's refusal to offer a limiting instruction after testimony about his failure to file taxes in 2004 and 2005. When the Government began questioning a witness about Henderson's tax filings, the district court *sua sponte* restricted counsel to a single question about filings directly related to the drug conspiracy. The court did not commit reversible error by failing to instruct the jury to disregard the testimony. *See* ***United States v. Davis***, 103 F.3d 660, 672 (8th Cir. 1996) (any "prejudicial effect" of evidence that defendant did not file taxes "did not outweigh its probative value").

C.

Henderson claims that the district court plainly erred by limiting defense counsel's questioning at trial. Because he raised no objection then, this court reviews for plain error. ***United States v. Harper***, 466 F.3d 634, 644 (8th Cir. 2006). "Under plain error review, the defendant must show: (1) an error; (2) that is plain; and (3) that affects substantial rights." ***United States v. Bain***, 586 F.3d 634, 640 (8th Cir. 2009). "A plain error will not be corrected unless (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings." ***Id.***, *citing* ***United States v. Olano***, 507 U.S. 725, 732 (1993).

A judge must maintain order during trial but remain "especially cautious, because a judge's influence on a jury is great and any word may prove controlling." ***United States v. Youngman***, 481 F.3d 1015, 1018 (8th Cir. 2007) (internal quotations omitted); *see* ***Skogen v. Dow Chemical Co.***, 375 F.2d 692, 703 (8th Cir. 1967) ("[A] trial judge . . . is more than a mere moderator or arbiter [and] has the obligation . . . to preside and conduct a fair and impartial trial, to rule out improper questions, and protect witnesses."); *see also* **Fed. R. Evid. 611(a)** ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence."). Henderson must show that "there is a reasonable probability that the outcome of his trial would have been different had the court not made the [limiting] statements." ***Harper***, 466 F.3d at 646. In reviewing for prejudicial effect, this court reviews "the trial as a whole." ***Youngman***, 481 F.3d at 1018.

The district court's actions did not prejudice Henderson. Once, the judge told defense counsel to ask a question "in about ten words." Sua sponte, the judge objected to a question on cross-examination. During trial, the judge warned counsel about asking too many questions. But most comments were out of the jury's hearing and to both parties. The judge also, sua sponte, instructed the Government to limit questioning on tax filings. Twice, the judge told Government counsel to "[a]sk a short question" and "[s]top talking." This is not a case where "[o]utrageous comments . . . destroy[ed] the integrity of the entire proceeding." ***Rush v. Smith***, 56 F.3d 918, 922 (8th Cir. 1995) (en banc) ("The trial judge committed plain error by telling the jury that the races have a tendency to stick together."). The judge did not overstep the bounds of appropriate judicial oversight.

D.

He objects to his sentence enhancement under 21 U.S.C § 841 based on two prior felony convictions because the district court failed to follow 21 U.S.C. § 851(b) procedure. This court reviews failure to engage in the colloquy required by § 851(b) for harmless error. ***United States v. Rounsavall***, 115 F.3d 561, 566 (8th Cir. 1997). An error is harmless if it does not affect the defendant's substantial rights. *See* ***United States v. Espinosa***, 585 F.3d 418, 430 (8th Cir. 2009). A "plain error that affects substantial rights may be considered even though it was not brought to the court's attention." **Fed. R. Crim. P. 52(b)**.

Henderson learned that the 1989 and 1993 convictions would support enhancement when the

Government filed an information before trial. The Government asserts that he failed to object to the information. *See* **21 U.S.C. § 851(c)** ("If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information."); ***United States v. Razo-Guerra***, 534 F.3d 970, 975 (8th Cir. 2008). But the district court erred by not asking him to affirm or deny the convictions. **21 U.S.C. § 851(b)** ("If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted."). Accordingly, he contends that the Government failed to meet its burden of proving the convictions. *See* ***United States v. Kellam***, 568 F.3d 125, 141 (4th Cir. 2009) (listing facts the government must prove).

The district court's error was, however, harmless. "Although § 851[(c)] allows a defendant to attack a prior conviction . . . [§ 851(e)] precludes challenges to convictions 'which occurred more than five years before the date of the information alleging such prior conviction.'" ***Rounsavall***, 115 F.3d at 566, *quoting* **21 U.S.C. § 851(e)**; ***United States v. Samuels***, 543 F.3d 1013, 1020 (8th Cir. 2008); *see also* ***Custis v. United States***, 511 U.S. 485, 487 (1994) (holding that due to statute, defendant cannot collaterally attack prior convictions used to enhance sentence unless in violation of the right to counsel). Henderson's convictions occurred 20 and 16 years before the date of the information, nullifying any § 851 (c) challenge. The district court's § 851(b) error did not, therefore, affect his substantial rights.

According to Henderson, this court should still reverse because the 1989 felony resulted in a suspended imposition of sentence, which is not a conviction under Missouri law. *See* ***State v. Lynch***, 679 S.W.2d 858, 860 (Mo. 1984). "We have previously held that the question of what constitutes a 'prior conviction' for purposes of § 841(b)(1)(A) is a matter of federal, not state, law, and . . . a suspended imposition of sentence qualifies as such a prior conviction." ***United States v. Craddock***, 593 F.3d 699, 701 (8th Cir. 2010) (prior Missouri suspended-imposition-of-sentence), *distinguishing* ***United States v. Stallings***, 301 F.3d 919 (8th Cir. 2002); ***United States v. Slicer***, 361 F.3d 1085, 1087 (8th Cir. 2004) (same); ***United States v. Franklin***, 250 F.3d 653, 665 (8th Cir. 2001) (same); ***United States v. Ortega***, 150 F.3d 937, 948 (8th Cir. 1998) (same). The district court's error was harmless.

E.

Henderson contends that the district court erred in excluding testimony from his former counsel at a pretrial hearing. He claims to have relied on this ruling in not calling his former counsel to testify, fundamentally altering his trial strategy. This court reviews "evidentiary rulings for abuse of discretion." ***United States v. Keiser***, 578 F.3d 897, 904 (8th Cir. 2009). "The district court has wide discretion in excluding evidence." ***United States v. Haskell***, 468 F.3d 1064, 1072 (8th Cir. 2006). To merit reversal, the error must have "a substantial influence on the jury's verdict." ***United States v. Smith***, 591 F.2d 974, 979 (8th Cir. 2010); *see* **Fed. R. Evid. 103(a)** ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.").

The testimony would have included DEA agents' alleged promises to Henderson on March 10 that induced his cooperation and, specifically, an agent's statement during the March 11 meeting: "Could your client live with a year or so?" The Government counters that this statement and much of the accompanying testimony are inadmissible hearsay. Irrespective of that, exclusion of the testimony did not substantially affect the jury's verdict.

On March 10, Henderson consented to a search and made statements about drug dealing. The following day, he voluntarily met with DEA agents. As the magistrate judge noted, nothing in the record supported Henderson's contention that promises caused him to waive his rights. The only evidence of discussion about a possible sentence occurred on March 11, the day after he agreed to cooperate. The counsel's testimony would not have led a reasonable jury to a different verdict given the significant evidence against Henderson at trial. *See* ***Haskell***, 468 F.3d at 1073 (no reversible error in excluding evidence where "the jury was [already] informed of the nature of defendant's cooperation with the government"). The district court's denial of this testimony does not require reversal.

III.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-3326

United States of America
Appellee

v.

Stephen Henderson
Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:08-cr-00187-CAS-2)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 10, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

184 (2)

No. 10-918

Supreme Court, U.S.
FILED
MAR 21 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

STEPHEN HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed plain error in finding that petitioner's guilty plea to a state drug felony, which resulted in the imposition of a suspended sentence, was a prior conviction for purposes of sentence enhancement.

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In the Supreme Court of the United States

No. 10-918

STEPHEN HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 613 F.3d 1177.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2010. A petition for rehearing was denied on September 10, 2010 (Pet. App. B1). On December 2, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 10, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner

was convicted on one count of conspiracy to distribute and possess with the intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 846, and one count of distributing more than five kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to life imprisonment, to be followed by ten years of supervised release. Pet. App. A4; Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A17.

1. In 2008, a confidential informant advised Drug Enforcement Administration (DEA) agents that the informant had purchased more than 50 kilograms of cocaine from petitioner. Presentence Report (PSR) ¶ 8. DEA agents then investigated petitioner's activities, and in March 2008, they monitored a drug transaction in which petitioner delivered ten kilograms of cocaine to a confidential informant. PSR ¶ 9. The investigation revealed that petitioner regularly sold between 10 and 30 kilograms of cocaine to six different buyers. *Ibid.* DEA agents then searched petitioner's girlfriend's house, as well as his alternate residence, seizing over $1.2 million in cash. PSR ¶ 10. Petitioner admitted that the seized money was proceeds from the sale of cocaine. *Ibid.*

2. A federal grand jury sitting in the Eastern District of Missouri returned a six-count indictment against petitioner and his supplier, who was charged as a co-conspirator. PSR ¶ 1. The indictment charged petitioner with one count of conspiring to distribute and possess with the intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 846, and one count of knowingly and intentionally distributing more than five kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1). PSR ¶¶ 1-2.

Under 21 U.S.C. 841(b)(1)(A), an offender who is convicted of manufacturing, distributing, dispensing, or possessing with intent to distribute large quantities of a controlled substance—in the case of cocaine, five kilograms or more—is subject to a mandatory minimum sentence if he commits the offense "after two or more prior convictions for a felony drug offense have become final." Before petitioner's trial, the government filed a criminal information detailing his two previous felony drug offenses and advising the court that, if convicted, petitioner would be subject to a mandatory minimum term of life imprisonment. PSR ¶ 3; see 21 U.S.C. 851.

Following petitioner's conviction, the PSR found that petitioner had previously been convicted of two Missouri drug felonies: illegal possession of a controlled substance (cocaine) in 1989 and illegal sale of cocaine in 1993. PSR ¶¶ 29, 33. The PSR therefore found that petitioner was subject to a mandatory minimum life sentence. PSR ¶¶ 67-68. Although petitioner objected to the applicability of the mandatory life sentence, he did not contest that his prior convictions were predicate offenses for purposes of Section 841(b)(1)(A). See PSR Addendum ¶¶ 67-68.

The district court sentenced petitioner to life imprisonment, to be followed by ten years of supervised release. Pet. App. A6; Judgment 2-3.

3. For the first time on appeal, petitioner argued that he was not eligible for the Section 841(b) sentencing enhancement because his 1989 felony conviction had resulted in a suspended imposition of sentence, whereby he served a year's probation in lieu of imprisonment. Pet. App. A16; see Pet. C.A. Br. 47-49. Petitioner argued that because a crime culminating in a suspended imposition of sentence constitutes neither a "conviction,"

nor a "final judgment" for most purposes under Missouri law, see *Yale* v. *City of Independence*, 846 S.W.2d 193, 195 (Mo. 1993) (en banc), his 1989 felony was not a predicate for purposes of the Section 841(b) sentence enhancement.

The court of appeals affirmed. Pet App. A1-A17. The court relied on Eighth Circuit precedent holding that "the question of what constitutes a 'prior conviction' for purposes of [Section] 841(b)(1)(A) is a matter of federal, not state, law." *Id.* at A16 (quoting *United States* v. *Craddock*, 593 F.3d 699, 701 (8th Cir. 2010)). Moreover, the court of appeals pointed out that under the same precedent, "a suspended imposition of sentence qualifies as such a prior conviction." *Ibid.* Accordingly, the court held that petitioner was properly subject to the enhanced sentence under Section 841(b). *Ibid.*

ARGUMENT

Petitioner contends (Pet. 11-25) that this Court's review is warranted because the courts of appeals are divided over whether state or federal law governs the definition of a "prior conviction" for purposes of the sentence enhancement provision of 21 U.S.C. 841(b). He further contends (Pet. 26-29) that the court of appeals violated the rule of lenity in choosing the more stringent of two lines of circuit case law governing the issue in question. Those contentions lack merit, and the decision below does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. a. Petitioner errs in arguing that state law should govern whether his 1989 felony constitutes a prior con-

viction for purposes of Section 841(b).[1] In *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 119 (1983), this Court recognized that "in the absence of a plain indication to the contrary, * * * it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *Ibid.* (citation and alteration omitted); see also, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 590-592 (1990). This rule "makes for desirable national uniformity" in the interpretation and application of federal statutes, "unaffected by varying state laws, procedures, and definitions of 'conviction.'" *Dickerson*, 460 U.S. at 112. In reliance on *Dickerson*, the courts of appeals have uniformly held that a state court's imposition of probation following a defendant's guilty plea is a "conviction" for purposes of 21 U.S.C. 841(b)'s sentence enhancement. See *United States* v. *Miller*, 434 F.3d 820, 823-824 (6th Cir.), cert. denied, 547 U.S. 1086 (2006); *United States* v. *Cisneros*, 112 F.3d 1272, 1280-1282 (5th Cir. 1997); *United States* v. *Mejias*, 47 F.3d 401, 402 (11th Cir. 1995); *United States* v. *Gomez*, 24 F.3d 924, 930 (7th Cir.), cert. denied, 513 U.S. 909 (1994); *United States* v. *Campbell*, 980 F.2d 245, 249-251 (4th Cir. 1992), cert. denied, 508 U.S. 952 (1993).

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[1] Because petitioner failed to raise in the district court his objection to the court's reliance on his 1989 conviction, his claim is subject to review only for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). To establish reversible plain error, petitioner must show that (1) there was an error, (2) that was plain, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). Petitioner cannot meet this heavy burden because, as explained in the text, the courts below correctly applied Section 841(b) to his 1989 felony.

In *Dickerson*, the manager of a company had previously pleaded guilty to a state criminal offense. The state court noted his plea and imposed a sentence of probation, but deferred—and eventually expunged—its judgment pursuant to state law. 460 U.S. at 107-108. This Court nevertheless held that the manager had been "convicted" for purposes of a federal statute barring firearms transactions by companies managed by convicted felons. See *id.* at 110-122. In reaching this conclusion, this Court emphasized that the manager had pleaded guilty to the state offense, noting that, in some circumstances, this Court had "considered a guilty plea alone enough to constitute a 'conviction.'" *Id.* at 112. In addition, this Court pointed out that the manager's sentencing judge had placed him on probation following his guilty plea. That action was effectively an adjudication of guilt because "one cannot be placed on probation if the court does not deem him to be guilty of a crime." *Id.* at 113-114. Furthermore, because the subsequent expungement meant "no more than that the State has provided a means for the trial court not to accord a conviction certain continuing effects under state law," this Court determined that it did not "alter the legality of the previous conviction and [did] not signify that the defendant was innocent of the crime to which he pleaded guilty." *Id.* at 115.[2]

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[2] Congress responded to *Dickerson* by providing that, for purposes of the firearms laws, "[w]hat constitutes a conviction of such a crime [punishable by imprisonment for a term exceeding one year] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. 921(a)(20). Although this provision means that state law now controls what constitutes a "conviction" in the firearms context, *Dickerson* continues to control the meaning of "con-

The same result should follow here. Section 841(b) contains no indication that Congress intended the imposition of the sentence enhancement to depend on whether state law would define a defendant's suspended sentence as a "conviction." See 21 U.S.C. 841(b) ("If any person commits a violation [of particular drug provisions] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release."). By contrast, when Congress does intend to utilize a state law definition of "conviction," it typically uses explicit language to that effect. See, *e.g.*, 18 U.S.C. 921(a)(20) (for purposes of sentence enhancement, "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held").

Under federal law, petitioner's 1989 felony drug offense clearly constitutes a "conviction." Petitioner pleaded guilty and was placed on probation. PSR ¶ 29. These actions indicate that the court actually adjudicated him guilty, and the imposition of a suspended sentence did not "alter the legality of the previous conviction and [did] not signify that [petitioner] was innocent." *Dickerson*, 460 U.S. at 115; see Mo. Ann. Stat. § 557.011(2)(3) (West 1996) (allowing a court to suspend the imposition of sentence "[w]henever any person *has been found guilty* of a felony or a misdemeanor") (emphasis added).

Congress enacted Section 841(b) to impose enhanced punishment on repeat drug offenders. See, *e.g.*, *United States* v. *LaBonte*, 520 U.S. 751, 758-759 (1997). Peti-

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viction" in other statutes, such as Section 841(b), that do not define that term.

tioner's two prior state court convictions demonstrate that he is a repeat drug offender. Missouri's provision for suspending the imposition of sentence was designed to show leniency to a deserving (and often first-time) offender. See *Yale* v. *City of Independence*, 846 S.W.2d 193, 195 (Mo. 1993) (en banc) ("with suspended imposition of sentence, trial judges have a tool for handling offenders worthy of the most lenient treatment").[3] That state law policy does not enable him to avoid a federal statute providing an enhanced punishment if he goes on to commit additional drug crimes. The court of appeals thus correctly determined that petitioner's 1989 felony offense constituted a prior conviction for purposes of Section 841(b).[4]

b. Contrary to petitioner's contention (Pet. 11-18), the decision below does not conflict with the Ninth Circuit's decisions in *Ramirez-Altamirano* v. *Holder*, 563 F.3d 800, 811-812 (2009), and *Rice* v. *Holder*, 597 F.3d 952, 956-957 (2010), with the Tenth Circuit's decision in

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[3] Even Missouri recognizes that suspended sentences do not bar treatment of the defendant as a recidivist. See Mo. Ann. Stat. § 558.016 (West 1999) (Missouri's recidivism statute subjects offenders who have "pleaded guilty" to a prior felony to enhanced sentences, even if the prior felony resulted in a suspended imposition of sentence); *State* v. *Talkington*, 25 S.W.3d 657 (Mo. Ct. App. 2000); see also Mo. Ann. Stat. § 491.050 (West 1996) (allowing witnesses who have previously pleaded guilty to a crime to be impeached by their prior "convictions," even if the court receiving the guilty plea imposed a suspended sentence).

[4] Petitioner's reliance (Pet. 21-22) on 18 U.S.C. 3607 is misplaced. As this Court recognized in *Dickerson*, 460 U.S. at 118, the creation of a statute providing that *some* adjudications resulting in probation do not count as convictions for repeat offender statutes "would be superfluous" if Congress thought that *all* adjudications resulting in such sentences do not count as prior convictions.

United States v. *Stober*, 604 F.2d 1274 (1979) (en banc), or with a decision of any other court of appeals.

None of the cases petitioner cites interprets 21 U.S.C. 841(b), the statute at issue here. Instead, the Ninth Circuit's decisions in *Ramirez-Altamirano* and *Rice* interpret Section 1229b(b)(1)(C) of Title 8 of the United States Code, which provides that, to be eligible for cancellation of removal, an alien must not have "been convicted of an offense" that would render him otherwise inadmissible or deportable. In both cases, an alien who had illegally entered the United States sought cancellation of removal. *Ramirez-Altamirano* and *Rice* followed a line of Ninth Circuit cases holding that an expunged conviction or suspended sentence does not constitute a conviction for purposes of the cancellation of removal statute. But those cases do not hold that state law definitions govern the federal removal law. Instead, in each case, the court reasoned that the Equal Protection Clause mandates that first-time state drug offenders be treated identically to first-time federal drug offenders, who may be eligible for cancellation of removal under the Federal First Offender Act. 18 U.S.C. 3607; *Ramirez-Altamirano*, 563 F.3d at 806; *Rice*, 597 F.3d at 956.

The government does not concede the merits of the Ninth Circuit's reasoning in *Ramirez-Altamirano* and *Rice*—reasoning that every other court of appeals to consider the issue has rejected. See, *e.g.*, *Wellington* v. *Holder*, 623 F.3d 115, 118-122 (2d Cir. 2010), petition for cert. pending, No. 10-933 (filed Jan. 28, 2011); *Elkins* v. *Comfort*, 392 F.3d 1159, 1162-1164 (10th Cir. 2004); *Resendiz-Alcaraz* v. *United States Att'y Gen.*, 383 F.3d 1262, 1266-1271 (11th Cir. 2004); *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 328-331 (5th Cir. 2004); *Acosta*

v. *Ashcroft*, 341 F.3d 218, 222-227 (3d Cir. 2003); *Gill* v. *Ashcroft*, 335 F.3d 574, 577-579 (7th Cir. 2003). Moreover, the Ninth Circuit's reasoning in *Ramirez-Altamirano* and *Rice* is not in tension with the Eighth Circuit's ruling in petitioner's case, which arises under a different statute outside the immigration context and raises no equal protection concerns. Cf. *United States* v. *Moore*, 543 F.3d 891, 897 (7th Cir. 2008) ("That [a] federal defendant may face harsher punishment than his state counterpart, or vice versa, simply does not raise equal protection concerns.").[5] Indeed, the government is aware of *no* case—in the Ninth Circuit or elsewhere—applying the reasoning of *Ramirez-Altamirano* and *Rice* to sentence enhancements under Section 841(b).

The alleged conflict with *Stober* is equally illusory. Ruling before *Dickerson*, the Tenth Circuit held in *Stober* that a defendant's previous guilty plea, followed by a deferred judgment, did not constitute a prior conviction for purposes of a federal firearms statute. 604 F.2d at 1276. Insofar as *Stober* relied on state law to determine whether a prior state adjudication constitutes a "conviction," *Stober*'s validity after *Dickerson* is doubtful. See *United States* v. *Pennon*, 816 F.2d 527,

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[5] Similarly, petitioner's reliance on the Full Faith and Credit Act, 28 U.S.C. 1738, is unavailing. That statute "obligates federal courts to give effect to the judgments of state courts," but its underlying principles "are simply not implicated when a federal court endeavors to determine how a particular state criminal proceeding is to be treated, as a matter of federal law, for the purpose of sentencing the defendant for a distinct and unrelated federal crime." *United States* v. *Fazande*, 487 F.3d 307, 308 (5th Cir. 2007); see, *e.g.*, *United States* v. *Jones*, 415 F.3d 256, 265 (2d Cir. 2005); *United States* v. *Guthrie*, 931 F.2d 564, 571 (9th Cir. 1991); *United States* v. *Carter*, 186 Fed. Appx. 844, 847 (10th Cir. 2006) (unreported).

528-529 (10th Cir.), cert. denied, 484 U.S. 987 (1987). But even if that were not the case, *Stober* is distinguishable. The Oklahoma Deferred Judgment Act at issue in *Stober* stipulated that a defendant's judgment is deferred "before a judgment of guilt." *Stober*, 604 F.2d at 1276; Okla. Stat. tit. 22, § 991c (Supp. 1977); see also *Stober*, 604 F.2d at 1276 ("This is *not* a deferred sentencing statute but a deferred judgment act."). Missouri's suspended judgment statute contains no analogous language; instead, it applies "[w]henever any person *has been found guilty* of a felony or a misdemeanor." Mo. Ann. Stat. § 557.011(2)(3) (West 1996) (emphasis added). In addition, unlike petitioner's guilty plea, Stober's guilty plea "was not accepted." 604 F.2d at 1278. Accordingly, the *Stober* court concluded, Stober's "guilt was not established." *Id.* at 1277-1278. By contrast, petitioner's guilt clearly was established in the 1989 proceeding: petitioner's plea was accepted, he was "found guilty," Mo. Ann. Stat. § 557.011(2)(3) (West 1996), and he was placed on probation, PSR ¶ 29, indicating that the state court "deem[ed] him to be guilty of a crime," *Dickerson*, 460 U.S. at 113-114.[6]

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[6] Petitioner's reliance (Pet. 17) on *Gubbels* v. *Hoy*, 261 F.2d 952 (9th Cir. 1958), also lacks merit. There, the Ninth Circuit held that an adjudication by court-martial was not a predicate conviction for the purposes of deportation. The court grounded its decision in a provision of immigration law barring deportation if the court that sentenced the defendant "ma[d]e, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation * * * that such alien not be deported," 8 U.S.C. 1251(b)(2) (1952); see 261 F.2d at 953-956. In particular, the Ninth Circuit pointed out that "a court-martial is an *ad hoc* body" and therefore poorly adapted "to the practical working of the procedures contemplated by [the statute]." *Id.* at 955-956. Petitioner's 1989 Missouri drug conviction raises no similar concerns.

2. Petitioner further contends (Pet. 26-29) that the Eighth Circuit has two conflicting lines of precedent addressing whether a guilty plea resulting in a suspended sentence constitutes a "conviction" for purposes of Section 841(b). Petitioner argues that, under the rule of lenity, the court below should have decided his case in accordance with the line of precedent more favorable to defendants. Petitioner's claim does not warrant review for several reasons. The court of appeals did not address this issue, see Pet. App. A1-A17, which petitioner raised for the first time in his reply brief in that court, see Pet. C.A. Reply Br. 25-26. Recognizing that it is "a court of review, not of first view," this Court generally declines to consider issues not addressed below. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). In addition, this Court does not grant review to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). But even if this court did resolve such intra-circuit splits, there is none here—the Eighth Circuit is unified in its rejection of petitioner's interpretation of 20 U.S.C. 841(b). Finally, even if the Eighth Circuit were divided on this issue, the rule of lenity would not apply to petitioner's claim: Section 841(b) contains no "grievous ambiguity," and the rule applies to statutory interpretation, not to the choice of which circuit precedent to follow.

a. Contrary to petitioner's contention, the Eighth Circuit does not currently have two conflicting lines of case law interpreting Section 841(b)'s enhancement provision. Rather, every panel to consider the issue has found that Missouri's suspended sentences support sentence enhancement under Section 841(b). See, *e.g.*, *United States* v. *Craddock*, 593 F.3d 699, 701-702 (8th Cir. 2010); *United States* v. *Davis*, 417 F.3d 909, 912-913

(8th Cir. 2005), cert. denied, 546 U.S. 1144 (2006); *United States* v. *Slicer*, 361 F.3d 1085, 1086-1087 (8th Cir.), cert. denied, 543 U.S. 914 (2004); *United States* v. *Franklin*, 250 F.3d 653, 665 (8th Cir.), cert. denied, 534 U.S. 1009 (2001); *United States* v. *Ortega*, 150 F.3d 937, 948 (8th Cir. 1998), cert. denied, 525 U.S. 1087 (1999).

Petitioner notes that *United States* v. *Stallings*, 301 F.3d 919, 921-922 (8th Cir. 2002), appears to take a different position. There, the Eighth Circuit determined that a defendant's prior California conviction that had been suspended pursuant to state law was not a proper predicate for a Section 841(b) enhancement. *Stallings* did not discuss *Dickerson* or relevant circuit case law interpreting Section 841(b). Instead, it relied heavily on the Ninth Circuit's previous determination that suspended sentences imposed under California law are not "convictions" in other contexts. *Id.* at 922 (discussing *United States* v. *Robinson*, 967 F.2d 287, 293 (9th Cir. 1992)).

Subsequent Eighth Circuit panels have been unequivocal in declining to follow *Stallings*. See, *e.g.*, *Craddock*, 593 F.3d at 701-702 (refusing to apply *Stallings* to the imposition of a suspended sentence under Missouri law); *Davis*, 417 F.3d at 912-913 (same); *Slicer*, 361 F.3d at 1086-1087 (reversing a district court that had relied on *Stallings* because *Stallings* did not address 21 U.S.C. 841' s finality requirement). Indeed, no panel of the Eighth Circuit has ever cited *Stallings* favorably, and no district court within the circuit has relied on *Stallings* since the court of appeals reversed the first district court to do so in *Slicer*. To the extent that petitioner seeks a writ of certiorari based on a purported conflict within Eighth Circuit case law, his case thus reaffirms that "[i]t is primarily the task of a Court of

Appeals to reconcile its internal difficulties." *Wisniewski*, 353 U.S. at 902; see also *Davis* v. *United States*, 417 U.S. 333, 340 (1974). The Eighth Circuit has reconciled the internal difficulty presented by *Stallings* by effectively confining that case to its facts.

b. Even if the Eighth Circuit were divided on this issue, the rule of lenity would not have required the court of appeals to apply *Stallings* in petitioner's case. As petitioner concedes (Pet. 28), the "rule of lenity traditionally applies to ambiguity within statutes." See, *e.g.*, *United States* v. *Santos*, 553 U.S. 507 (2008); *United States* v. *Granderson*, 511 U.S. 39 (1994); *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992); *Crandon* v. *United States*, 494 U.S. 152 (1990); *Williams* v. *United States*, 458 U.S. 279 (1982); *Bifulco* v. *United States*, 447 U.S. 381 (1980). Moreover, the rule applies only where a statute includes a "grievous ambiguity or uncertainty," such that, "after seizing everything from which aid can be derived," a court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (citations, internal quotation marks, and alterations omitted). That is not the case here. Although Section 841(b) does not define "conviction," *Dickerson* makes clear that "[i]n the absence of a plain indication to the contrary," it is to be assumed that a federal statute's application turns on federal law. 460 U.S. at 119. As discussed above, the courts of appeals have uniformly reached that conclusion, and *none* has found that the statute is grievously ambiguous on that point.

Nor is petitioner correct to contend (Pet. 28) that given *Stallings*, "the rationale behind the rule [of lenity], that due process requires fair notice to the defen-

dant of the consequences of his actions, necessitates that" the rule apply to his case. Petitioner's drug conspiracy lasted from June 2006 to March 2008. PSR ¶ 1. Had petitioner surveyed the relevant case law during or before that period, he would have discovered at least two Eighth Circuit cases imposing enhanced sentences on defendants situated similarly to himself. See *Davis*, 417 F.3d at 912-913; *Slicer*, 361 F.3d at 1086-1087. In light of the statute's clarity and those cases, petitioner had sufficient notice of the enhanced consequences he would face if he violated the federal drug laws. Cf. *Smith* v. *United States*, 508 U.S. 223, 239 (1993) ("The mere possibility of articulating a narrower construction * * * does not by itself make the rule of lenity applicable.").

Finally, this Court has repeatedly declined to review claims substantially similar to the one raised by petitioner.[7] See, *e.g.*, *Lehan* v. *United States*, 130 S. Ct. 1735 (2010) (No. 09-5661); *Brown* v. *United States*, 528 U.S. 963 (1999) (No. 98-2059); *Campbell* v. *United States*, 508 U.S. 952 (1993) (No. 92-7444). There is no reason for a different result in this case.

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[7] A similar question is presented by *Williams* v. *United States*, petition for cert. pending, No. 10-8465 (filed Jan. 14, 2011).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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